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the extent of territory as well as subject matter. Only the utmost necessity should permit a legislative body or a commission, be it a limited sovereign body or not, to exercise the powers claimed by the Interstate Commission and granted by lower court. It is the capability of abuse and not the probability of it which is to be regarded in judging of the reasons which lie at the foundation and guide in the interpretation of such constitutional restrictions.[12]

The founders[13] of our Constitution intended that, by the superintending care of the States, all the more domestic and personal interests of the people should be regulated and provided for. Though the regulation of commerce was then a new power opposed by few, from which no apprehensions were entertained, yet, through it, the Federal Government has been enabled greatly to encroach upon the jurisdictions of the States. The failure of the States to curb predatory wealth will result in a continuous strengthening and centralization of power in the nation.[14] It behooves the States to exercise their ample powers[15] over the creatures of their sovereignty, else the sentiments and sanction of the sovereign people will crystallize upon the Federal Government and the courts, under pressure of such public opinion, will interpret our fundamental laws accordingly.[16]

Implied Trusts and the Statute of Frauds.

The principle that where a conveyance is made to B and the purchase money is paid by C, a trust arises in favor of C was recently re-stated in *Turpin* v. *Miles,* 71 Atl. 440 (Md., 1908). This sort of a resulting trust was included in Lord Hardwicke's classification[1] and from that time such has been the general common law rule.[2] Since the reason for the resulting use, the fact that it was the custom of the time for the legal title to be in one person and the use to be in another,[3]

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[12] Emery's Case, 107 Mass. 172 (1871).

[13] The Federalist, XLV, XLVI.

[14] Ivins and Mason, Preface X, *supra.*

[15] *State* v. *Express Co.,* 81 Me. 87; *Hale* v. *Henkel,* 201 U. S. 43.

[16] The recent book of Ivins and Mason, on Control of Public Utilities, concisely and correctly defines the functions and powers of such commissions.

[1] *Lloyd* v. *Spillet,* 2 Atk. 148 (1740).

[2] *Contra, Nashville* v. *Lannom,* 36 S. W. 977 (Tenn. 1896).

[3] Introduction to the History of the Law of Real Property, by K. E. Digby, 4th Ed. 327, 1892.

passed away on the enactment of the Statute of Uses, there is no longer any reason for the presumption of the trust in favor of the one paying the money.[4] Accordingly, a number of States have supplanted the common law rule by statute. In Wisconsin,[5] Michigan[6] and Minnesota[7] resulting trusts are abolished in terms and no parol agreement for the grantee to hold the land in trust may be shown. In Kentucky C is allowed to recover from the grantee B the money he has paid, on the ground of a presumption arising that the grantee consented to the expenditure of the money for his use.[8] In Kansas [9] and Indiana,[10] while resulting trusts are abolished, a parol agreement that the grantee shall hold in trust for the one paying the money is allowed to be shown, and the same conclusion seems to have been arrived at without the aid of a statute in at least one jurisdiction.[11] Under the later New York cases,[12] the statute abolishing resulting trusts has been construed as the like statute in Indiana and Kansas. While the statute with the last stated interpretation provides the best rule, the old common-law doctrine as announced in the principal case, though perhaps without justification historically, as shown above, is a far better rule than the Michigan and Wisconsin view, especially since under the second the presumption may be rebutted by showing that the money was lent to the grantee,[13] or that no trust was intended to be raised.[14]

Another question suggested by the decision is whether, when there is a conveyance by A to B on a parol trust for A, a trust may arise for A's benefit by operation of law. The result of the English cases is that such a trust does arise for the reason that to hold otherwise would be to allow the Statute of Frauds to become a cover for fraud, which was not intended. The

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[4] See article "Constructive Trusts Based Upon the Breach of an Express Oral Trust of Land," by J. B. Ames, 20 Harv. L. Rev. 549, 555 (1907).

[5] *Skinner* v. *James,* 69 Wisc. 605 (1887); *Whiting* v. *Gould,* 2 Wisc. 552 (1853).

[6] *Chapman* v. *Chapman,* 114 Mich. 144 (1897).

[7] *Ryan* v. *Williams,* 92 Minn. 506 (1904).

[8] *Martin* v. *Martin,* 5 Bush, 47, 56 (Ky. 1868).

[9] *Franklin* v. *Colley,* 10 Kans. 260, 265 (1872).

[10] *Glidewell* v. *Spaugh,* 26 Ind. 319, 322 (1866).

[11] *Nashville* v. *Lannom, supra.*

[12] *Jeremiah* v. *Pitcher,* 26 N. Y. Appel. Div. 402 (1898); aff. in 163 N. Y. 574 (1900); *Fagan* v. *McDonell,* 100 N. Y. Sup. 641.

[13] *Whaley* v. *Whaley,* 71 Ala. 162 (1881).

[14] *Rider* v. *Kidder,* 10 Vesey Jr. 360 (1805).

fraud alleged is "not in the deed, but in relying upon it to give effect to something which was not the real intention of the parties."[15] It will be seen that this is purely equitable fraud,[16] there being no tort connected with the transaction; but this should have no effect upon the raising of the trust or the enforcement of rights under it, though it seems to have been thought of some consequence in another class of cases.[17] The English view has been taken in a very clear and unequivocal dictum [18] in America, but to the writer's knowledge, in no decided case; on the other hand, the contrary has been generally held.[19] In Massachusetts, while equity refuses to raise a trust in favor of the grantor A,[20] he is allowed to recover the value of the land as at the time of the conveyance.[21]

On principle, the English position that as the Statute of Frauds was passed to prevent fraud, it should not be allowed to be an instrument of fraud is permitting the preamble of the statute to control, although the enacting part is clear and unambiguous, a doctrine contrary to the rules of statutory interpretation.[22] Another view regards the situation simply as one where the grantee has land belonging to the grantor and which he is unconscionably holding. The grantor might recover in quasi-contract the value of his property, but could not get the specific property because of the inability of the law to award anything but damages. Since, however, equity has the power to compel a restitution of the specific property, it would seem that this should be done here.[23] This it is urged is not enforcing the express trust, but a trust raised by operation of law.

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[15] *In re* Duke of Marlboro; *Davis* v. *Whitehead,* L. R. [1894], 2 Ch. 133.

[16] A Treatise on Equity Jurisprudence, by J. N. Pomeroy, sec. 873.

[17] Where A conveys or devises to B on the latter's fraudulent parol promise to hold in trust for C, C has been allowed to enforce tho the contrary is held where the parol promise is not fraudulent. *Larmon* v. *Knight,* 140 Ill. 232 (1892); *Goldsmith* v. *Goldsmith,* 145 N. Y. 313 (1895). In these cases the conclusion reached was correct because C was also A's heir, but the reasoning would allow C to enforce, were this otherwise.

[18] *Peacock* v. *Nelson,* 50 Mo. 256, 261 (1872).

[19] *Sturtevant* v. *Sturtevant,* 20 N. Y. 39 (1859); *Brock* v. *Brock,* 90 Ala. 86 (1889).

[20] *Titcomb* v. *Marrill,* 10 Allen, 15 (Mass. 1865).

[21] *Cromwell* v. *Norton,* 193 Mass. 291 (1906).

[22] Cardinal Rules of Legal Interpretation, by E. Beal. 2nd Ed. 253 (1908).

[23] Keener on Quasi Contracts, 286 (1893).

To those feeling the need of following strictly the spirit of the Statute of Frauds, as expressed by the preamble, the English doctrine appeals; to those demanding strict adherence to the statute and who think that more harm will be done by letting in the parol testimony than by refusing the trust, the Massachusetts rule appeals; but to allow the grantee to keep the land and pay nothing for it seems unsupportable.[24]

Is There Consideration in Successive Promises to Perform the Same Thing?

The oft discussed question of whether a promise to perform that which one is already bound to perform by a prior contract was raised in a recent case. The problem may come up in two forms: (1) Where the new promises pass between the same parties who are bound by the earlier contract[1]; (2) where the promises pass between one of the parties to the original contract and a third party.[2]

It is our purpose to confine our attention to the first class of cases.

In *Weed* v. *Spears*[3] five stockholders of a corporation in order to aid its credit, in 1894 mutually obligated themselves to pay the notes and obligations then existing, or which should thereafter come into existence, upon which the names of any two stockholders appeared. In 1897 two stockholders, A and B, entered into an oral agreement by which A promises to pay certain notes, subject to the provision of 1894, and B certain others. B did not fulfil his obligation and A was compelled to pay one of the notes B had promised to discharge. In an action by A to recover the money from B, judgment was given for B on the ground that a promise to do the same thing which one is already bound to perform by a prior contract is no consideration for a subsequent one. This is undoubtedly the Settled English view. Most of the early cases, however, were "ship" cases, where sailors were promised additional compensation to fulfil the shipping articles which they had signed when starting on their voyage.[4] Public policy was the con-

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[24] See article "Resulting Trusts and the Statute of Frauds," by Harlan F. Stone, 6 Col. L. Rev. 326 (1906).

[1] *Stilk* v. *Myrick*, 2 Camp. 317 (1809).

[2] *Shadwell* v. *Shadwell*, 9 C. B., N. S. 159 (1860).

[3] N. Y. 86, No. E. 10 (1908).

[4] *Fraser* v. *Hatton*, 2 C. B., N. S. 512 (1857); *Silk* v. *Myrick*, *supra*.